

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to repeal §§2.201-2.214 and adopt new §§2.201-2.207 relating to Memorandum of Understanding with the Texas Parks and Wildlife Department to be codified under Title 43, Texas Administrative Code, Part 1.

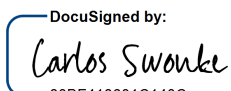
The preamble and the adopted repealed sections and new sections, attached to this minute order as Exhibits A, B, and C, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

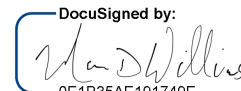
IT IS THEREFORE ORDERED by the commission that the repeal of §§2.201-2.214 and new §§2.201-2.207 are adopted and are authorized for filing with the Office of Secretary of State.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:

Recommended by:

DocuSigned by:

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Director, Environmental Affairs Division

DocuSigned by:

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Executive Director

116037 June 30 2021

Minute	Date
Number	Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts the repeal of §§2.201-2.214 and new §§2.201-2.207, concerning Memorandum of Understanding with the Texas Parks and Wildlife Department. The repeal of §§2.201-2.214 and new §§2.201-2.207 are adopted without changes to the proposed text as published in the April 9, 2021 issue of the *Texas Register* (46 TexReg 2413) and will not be republished.

EXPLANATION OF ADOPTED REPEAL AND NEW SECTIONS

Transportation Code, §201.607 requires the department to adopt a memorandum of understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment or for the preservation of historic or archeological resources. Transportation Code, §201.607 also requires the department to adopt the MOU and all revisions to it by rule and to periodically evaluate and revise the MOU. The department has evaluated its MOU with the Texas Parks and Wildlife Department (TPWD) adopted in 2013, and finds it necessary to repeal existing §§2.201 - 2.214 and simultaneously adopt new §§2.201 - 2.207.

New §§2.201 - 2.207 have been agreed upon by department staff and TPWD staff. The intent of the MOU is to foster communication, collaboration, and cooperation between TPWD and

1 TxDOT on the review of transportation projects and protection of
2 State natural resources.

3
4 The new MOU is more streamlined and straightforward compared to
5 the existing MOU. It removes the various analyses that are
6 required to determine whether coordination with TPWD is required
7 on a given transportation project under the existing MOU, which
8 are overly complicated and unnecessary. A simpler threshold is
9 needed because the number of projects that require environmental
10 review, including potential analyses to determine whether
11 coordination with TPWD is triggered, has increased dramatically
12 in recent years, from 1,669 projects in 2013 to 4,302 projects
13 in 2019. Therefore, the new MOU requires coordination on
14 projects that require an environmental assessment or
15 environmental impact statement, which is a substantially more
16 straightforward threshold compared to the existing MOU.

17
18 In addition to simplifying the threshold for coordination with
19 TPWD, the new MOU will reduce the number of projects coordinated
20 by eliminating the requirement to coordinate with TPWD on
21 projects that are categorically excluded from the requirement to
22 prepare an environmental assessment or environmental impact
23 statement. Under the new MOU, this will reduce the number of
24 projects requiring coordination to fewer than 100 per year.
25 This will allow department and TPWD staff to focus their
26 coordination efforts on larger scale transportation projects.

1 Projects that do not require an environmental assessment or
2 environmental impact statement can still be coordinated with
3 TPWD at TxDOT's discretion.

4
5 The new MOU also streamlines the actual coordination process.
6 Under the existing MOU, there are two types of coordination,
7 "early coordination" and "administrated coordination." The
8 existing MOU is not specific about the type of information that
9 must be provided by the department to TPWD for early
10 coordination, but rather states that TPWD will notify the
11 department when documentation is sufficient to conduct early
12 project coordination. For administrated coordination, the
13 existing MOU requires submittal of a coordination packet to
14 TPWD, including a "Tier II site assessment." The new MOU
15 streamlines this procedure by requiring the department to
16 contact TPWD when it has completed its analysis of potential
17 impacts to fish, wildlife, and other natural resources, at which
18 point TPWD may review the information in the department's on-
19 line Environmental Compliance Oversight System (ECOS). Then,
20 when the department releases the draft environmental assessment
21 or draft environmental impact statement for the project, the
22 department will provide TPWD with the notice of availability of
23 the document, at which point TPWD will have 45 days to provide
24 comments back to the department. In other words, instead of
25 preparing special analyses and documents specifically for
26 coordination with TPWD, the new MOU relies on documentation that

1 the department already prepares as part of its overall
2 environmental review of the project. The MOU also provides that
3 the department will respond to TPWD comments as outlined in
4 Section 12.0011(c) of the Texas Parks and Wildlife Code.

5
6 The new MOU also provides that TPWD will provide a set of non-
7 project-specific recommended best management practices (BMPs),
8 which the department will post on its external website. The
9 department will indicate in the environmental assessment or
10 environmental impact statement which of the recommended BMPs
11 will be applied to the project.

12
13 The new MOU also reduces the number of department-funded staff
14 positions at TPWD. Under the existing MOU, the department funds
15 two TPWD staff positions to facilitate TPWD's review of
16 department projects. Because of the simpler coordination
17 threshold and procedures, and fewer number of projects
18 coordinated under the new MOU, the new MOU reduces the number of
19 TPWD staff positions funded by the department to one.

20
21 The new MOU also provides that the department and TPWD will
22 identify and collaborate on mutually agreeable conservation
23 actions, and will appoint members to an interagency team that
24 will meet on at least a bi-annual basis to discuss and make
25 recommendations for opportunities for the agencies to partner on
26 conservation actions.

The new MOU also contains updated provisions governing the department's use of TPWD's Texas Natural Diversity Database (TXNDD).

The new MOU also eliminates the need for additional programmatic agreements. The existing MOU calls for six programmatic agreements between the department and TPWD, in addition to the MOU itself. These additional agreements are not necessary under the new agreed-upon coordination procedures.

SECTION BY SECTION EXPLANATION OF ADOPTED MOU

Section 2.201, Purpose, sets out the purpose of the new MOU, explains that it supersedes the existing MOU and programmatic agreements, and explains that the effective date will be the date on which this rulemaking becomes effective.

Section 2.202, Definitions, contains definitions of terms used in the new MOU.

Section 2.203, Applicability, explains the applicability of the new MOU. It explains that the department will coordinate with TPWD on projects that require an environmental assessment or environmental impact statement, and that the department may coordinate other projects with TPWD at its discretion. It also explains that, under certain circumstances, the department will

1 coordinate reevaluations of projects previously coordinated with
2 TPWD under the existing MOU.

3
4 Section 2.204, Coordination and Communication, sets forth the
5 coordination process for projects subject to coordination under
6 the new MOU. It explains that the department will contact TPWD
7 when it has completed its analysis of potential impacts to fish,
8 wildlife, and other natural resources, and will provide TPWD
9 with access to ECOS so that TPWD staff can review the
10 information prepared by the department. It explains that TPWD
11 will provide the department with its recommended non-project-
12 specific BMPs, and the department will post them on its external
13 website. It explains that the department will indicate in the
14 environmental assessment or environmental impact statement which
15 BMPs will be applied to the project. It explains that the
16 department will provide TPWD with the notice of availability of
17 the draft environmental assessment or environmental impact
18 statement, that TPWD will provide comments within 45 days, and
19 that the department will respond to TPWD's comments as outlined
20 in Section 12.0011(c) of the Texas Parks and Wildlife Code.

21
22 Section 2.205, Commitments, provides that the department will
23 provide funding, through an interagency contract, for one TPWD
24 employee to review transportation projects under the new MOU.
25 It also provides that the department and TPWD will identify and
26 collaborate on mutually agreeable conservation actions.

1

2 Section 2.206, Interagency Team, requires the department and
3 TPWD to appoint members to an interagency team that will meet at
4 least on a bi-annual basis to discuss and make recommendations
5 for opportunities for the agencies to partner on conservation
6 actions.

7

8 Section 2.207, Texas Natural Diversity Database, provides that
9 TPWD will continue to provide information from its TXNDD to the
10 department, that the department will conduct training on access
11 and use of the TXNDD to its employees, and that the department
12 will report to TPWD observations of species of greatest
13 conservation need within TxDOT project areas.

14

15 COMMENTS

16 TPWD submitted a letter in support of the new MOU. TPWD stated
17 in its letter that TPWD and TxDOT worked cooperatively to
18 evaluate and revise the MOU to satisfy both agencies' intent to
19 foster communication, collaboration, and cooperation on the
20 review of transportation projects and protection of state
21 natural resources. TPWD also stated that it believes this new
22 MOU will streamline and improve the agencies' environmental
23 review process. No other comments on the proposed repeal and
24 new sections were received.

25

26 STATUTORY AUTHORITY

1 The repeal and new sections are adopted under Transportation
2 Code, §201.101, which provides the Texas Transportation
3 Commission (commission) with the authority to establish rules
4 for the conduct of the work of the department, and more
5 specifically, §201.607, requiring the department to have an MOU
6 with TPWD and to adopt it by rulemaking.

7

8 CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING
9 Transportation Code, §§201.604, 201.607, and 201.752.

SUBCHAPTER G. MEMORANDUM OF UNDERSTANDING WITH THE
TEXAS PARKS AND WILDLIFE DEPARTMENT

§2.201. Purpose.

(a) Transportation Code §201.607 requires the Texas Department of Transportation (TxDOT) to adopt a memorandum of understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment or for the preservation of historical or archeological resources, and requires TxDOT and each of the agencies to adopt the memoranda and all revisions by rule. This subchapter contains the MOU between TxDOT and the Texas Parks and Wildlife Department (TPWD) that implements that section.

(b) This subchapter furthers TxDOT's environmental policy, as found in §2.2 of this chapter (relating to Environmental Policy), to integrate environmental considerations into department activities to achieve compliance with applicable laws, regulations and standards. TxDOT will focus on delivering safe, efficient transportation projects and making sound decisions based on a balanced consideration of transportation needs and of social, economic, and environmental impacts of proposed transportation improvements.

(c) According to Parks and Wildlife Code §12.0011, TPWD is the state agency with primary responsibility for protecting the state's fish and wildlife resources; providing recommendations that will protect fish and wildlife resources to local, state, and federal agencies that approve, permit, license, or construct

1 developmental projects; providing information on fish and
2 wildlife resources to any local, state, and federal agencies or
3 private organizations that make decisions affecting those
4 resources.

5 (d) Except as specified in subsection (f) of this section,
6 this MOU supersedes the MOU adopted on September 1, 2013 and
7 associated programmatic agreements. Nothing in this subchapter
8 supersedes, modifies, or nullifies any other agreement entered
9 into by TxDOT and TPWD.

10 (e) TxDOT and TPWD shall examine and revise this MOU not
11 later than the fifth anniversary of its effective date, as
12 required by Transportation Code, §201.607. Notwithstanding the
13 above, this MOU remains in effect until revised or terminated by
14 written agreement of TxDOT and TPWD.

15 (f) The effective date of this MOU is the date on which
16 this Subchapter G takes effect. Projects for which coordination
17 with TPWD has been initiated prior to the effective date of this
18 MOU will complete coordination under the procedures of the
19 September 2013 MOU. Projects for which coordination with TPWD
20 has not been initiated prior to the effective date of this MOU
21 will be governed by this MOU. A project that requires
22 reevaluation, and subsequently requires coordination as
23 specified in §2.203 of this subchapter (relating to
24 Applicability), will be governed by this MOU.

25 (g) The intent of the MOU is to foster communication,
26 collaboration, and cooperation between TPWD and TxDOT on the

1 review of transportation projects and protection of State
2 natural resources.

3
4 §2.202. Definitions.

5 The following words and terms, when used in this subchapter, or
6 in documents prepared by TxDOT or TPWD pursuant to this
7 subchapter, have the following meanings.

8 (1) Best or Beneficial Management Practices (BMPs)--
9 Measures provided by TPWD that will result in avoidance and
10 minimization of potential impacts to natural resources.

11 (2) Categorical Exclusion (CE)--A category of actions
12 that have been found to have no significant effect on the
13 environment, individually or cumulatively, and are excluded from
14 the requirement to prepare an Environmental Assessment or
15 Environmental Impact Statement as defined in §2.81 of this
16 chapter (relating to Categorical Exclusions).

17 (3) Environmental Assessment (EA)--Environmental
18 documentation required for a transportation project that TxDOT
19 has not classified as a categorical exclusion and that does not
20 clearly require the preparation of an EIS, or if TxDOT believes
21 that an EA would assist in determining the need for an EIS, as
22 defined in §2.83 of this chapter (relating to Environmental
23 Assessments).

24 (4) Environmental decision--The official record
25 created after coordination, analysis, and reviews are completed
26 concluding that an action and its environmental impacts have

1 been adequately identified and assessed. A Finding of No
2 Significant Impact (FONSI) is the environmental decision
3 document for an EA and a Record of Decision (ROD) is the
4 environmental decision document for an EIS.

5 (5) Environmental Impact Statement (EIS)--
6 Environmental documentation required for a transportation
7 project if there are likely to be significant environmental
8 impacts, as defined in §2.84 of this chapter (relating to
9 Environmental Impact Statements).

10 (6) Interagency Team (IAT)--As defined in §2.206 of
11 this subchapter (relating to Interagency Team), TPWD and TxDOT
12 staff identified to communicate on behalf of TPWD and TxDOT to
13 carry out the MOU.

14 (7) Qualified biologist--A qualified biologist must
15 have, at a minimum, a successful completion of a full 4-year
16 course of study in an accredited college or university leading
17 to a bachelor's or higher degree with a major in biological
18 sciences, natural resource management, wildlife science or
19 management, ecology, zoology, botany, conservation biology, or a
20 closely related field and have experience relevant to the
21 species, habitat, or ecosystems that are being studied or
22 described.

23 (8) Reevaluation--The review and determination of the
24 validity of the environmental decision under certain
25 circumstances involving changes or delays subsequent to the

environmental decision as defined in §2.85 of this chapter
(relating to Reevaluations).

(9) Riparian habitat--The area of interface between
land and a waterway (e.g., river or stream). River- or
creek-dependent habitats which rely on periodic flooding or
flushing, sub-irrigated substrates, and other influences of the
ephemeral or perennial rivers or creeks to which they are
adjacent, including floodplains, wet woodlands, gallery riverine
forests, oxbows, swamps, and vegetated islands.

(10) Texas Natural Diversity Database (TXNDD)--A TPWD-
owned and maintained database of natural resource records,
including species of greatest conservation need (SGCN) and other
tracked species, important remnant native vegetation, and other
features of Texas natural history.

(11) TPWD--Texas Parks and Wildlife Department.

(12) TPWD Transportation Staff--The qualified
biologist at TPWD that is assigned to work solely on
transportation projects and related matters.

(13) TxDOT--Texas Department of Transportation.

§2.203. Applicability.

(a) TxDOT will coordinate with TPWD on federal and state
transportation projects that require an EA or EIS.

(b) TxDOT may coordinate other projects that do not require
an EA or EIS with TPWD at TxDOT's discretion.

(c) If TxDOT prepares a reevaluation for a transportation project that was previously coordinated with TPWD under the 2013 MOU, TxDOT will coordinate the reevaluation with TPWD when any of the following apply:

(1) New impacts not included in previous coordination or increase in impacts from previous coordination to terrestrial and aquatic state-listed species or their habitat as determined by a qualified biologist or rare plant communities with a record in the TXNDD or any state rank or rank range that includes a 1, 2, or 3.

(2) New or increased impacts to riparian habitat or water resources.

(3) Change to commitments made during previous coordination, including BMPs.

(4) Reevaluations of CE level projects with new or increased impacts may be re-coordinated at TxDOT's discretion.

(d) This subchapter does not apply to individual maintenance projects for which a programmatic environmental review is conducted under §2.133 of this chapter (relating to Maintenance Projects and Programs).

§2.204. Coordination and Communication.

(a) For projects requiring an EA or EIS, TxDOT will contact TPWD when TxDOT has completed its analysis of potential impacts to fish, wildlife, and other natural resources. To facilitate

1 collaborative review, TxDOT will provide access to TxDOT's
2 Environmental Compliance Oversight System (ECOS).

3 (b) TxDOT will post on the Environmental Compliance Toolkit
4 webpage the set of BMPs as recommended by TPWD. This set of BMPs
5 is non-project specific. The application of specific BMPs to
6 individual projects will be determined by TxDOT at its
7 discretion.

8 (c) TxDOT will indicate in the draft EA or draft EIS the
9 TPWD-recommended BMPs that will be applied to the project. TxDOT
10 may also include information shared by TPWD during collaborative
11 review.

12 (d) To ensure TxDOT will benefit from any recommendations
13 or information provided by TPWD early in the environmental
14 review process, TxDOT will follow the procedure indicated below.

15 (1) At or around the same time that a draft EA or
16 draft EIS is made available for public review, but no less than
17 45 days before the issuance of an environmental decision, TxDOT
18 will email the notice of availability of the document required
19 by §2.108 of this chapter (relating to Notice of Availability)
20 to TPWD at the following email address:
21 WHAB_TxDOT@tpwd.texas.gov or the email account designated by
22 TPWD.

23 (2) The email communication described in subsection
24 (1) will serve as the "request for comments" in Parks and
25 Wildlife Code §12.0011(b-1).

1 (3) To facilitate review of a draft EA or EIS, TxDOT
2 will provide access to TxDOT's ECOS.

3 (e) If TPWD has any information or recommendations to
4 conserve fish and wildlife species and other natural resources
5 it wishes to provide to TxDOT in response to a request for
6 comments, TPWD will provide them in writing to TxDOT within 45
7 days of the date on which TxDOT submitted the request for
8 comments by email.

9 (f) If TPWD provides any recommendations or information
10 regarding fish and wildlife to TxDOT after the 45-day deadline
11 specified in subsection (e) of this section, then TxDOT will
12 consider such recommendations or information to the extent
13 practicable.

14 (g) TxDOT will respond as outlined in Parks and Wildlife
15 Code §12.0011(c).

16 (h) Electronic communication will be used to the maximum
17 extent practical.

18
19 §2.205. Commitments.

20 (a) TxDOT will provide funding, through an interagency
21 contract, for one TPWD employee to review transportation
22 projects under this agreement. TxDOT will actively and
23 consistently engage this employee in project development,
24 conservation actions, and other natural resource coordination
25 needs as determined appropriate by TxDOT. The interagency

1 contract to fund the review of transportation projects will be
2 renewed biennially at TxDOT's discretion.

3 (b) Through that same interagency contract or other
4 authority as appropriate, TxDOT and TPWD will identify and
5 collaborate on mutually agreeable conservation actions.
6 Conservation actions to be undertaken will be described in
7 detail in an interagency contract document or associated
8 workplan agreed upon by the IAT.

9
10 §2.206. Interagency Team.

11 (a) Each agency shall mutually appoint members to IAT which
12 will meet at least on a bi-annual basis.

13 (b) An Interagency Team shall discuss and make
14 recommendations for opportunities for the agencies to partner on
15 conservation actions including but not limited to research,
16 offsets, specification development, and restoration
17 opportunities.

18
19 §2.207. Texas Natural Diversity Database (TXNDD).

20 (a) This MOU authorizes certain limited use and
21 distribution of TXNDD information and specifies security
22 requirements.

23 (b) TPWD will continue to provide TXNDD information to
24 TxDOT on a schedule agreed upon by both parties.

25 (c) Except as provided in subsections (d), (e) and (f) of
26 this section, TxDOT will not release the TXNDD or any portion of

1 it to outside parties unless TxDOT receives a request under the
2 Texas Public Information Act for the TXNDD or information
3 contained therein, in which case TxDOT will notify TPWD of the
4 request.

5 (d) Texas Public Information Act requests for copies of
6 approved environmental review documents and environmental
7 reports that contain information from the TXNDD do not require
8 TPWD notification. Such documents and reports are not subject
9 to the restrictions in subsection (c) of this section and may be
10 disclosed to the public by TxDOT.

11 (e) TxDOT will conduct training on access and use of the
12 TXNDD as it relates to transportation projects for TxDOT
13 environmental staff and environmental contract employees. TPWD
14 will assist in training development and implementation if
15 requested.

16 (f) TxDOT will provide completed TXNDD reporting forms or
17 any other format preferred by TPWD for observations of SGCN
18 occurrences, which include federally and state protected
19 species, within TxDOT project areas and collected by TxDOT staff
20 and contract individuals.

SUBCHAPTER G. MEMORANDUM OF UNDERSTANDING WITH THE
TEXAS PARKS AND WILDLIFE DEPARTMENT

§2.201. Purpose.

(a) Transportation Code, §201.607, requires the Texas Department of Transportation (TxDOT) to adopt a memorandum of understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment or for the preservation of historical or archeological resources, and requires TxDOT and each of the agencies to adopt the memoranda and all revisions by rule. This subchapter contains the memorandum of understanding between TxDOT and the Texas Parks and Wildlife Department (TPWD) that implements that section.

(b) This subchapter furthers the environmental policy of TxDOT to protect, preserve, and when possible, enhance the environment, and the responsibility of TPWD for protecting the state's fish and wildlife resource.

(c) This MOU supersedes the MOU that was adopted to be effective March 21, 1999; the Memoranda of Agreement for the Finalization of 1998 MOU Concerning Habitat Descriptions and Mitigation that was signed August 2, 2001; the MOU Regarding Mitigation Banking that was signed December 7, 2005; and the Memorandum of Agreement for Sharing and Maintaining Natural Diversity Database Information that was signed April 11, 2007. Nothing in this subchapter supersedes, modifies, or nullifies any other agreement entered into by TxDOT and TPWD.

(d) TxDOT and TPWD shall review and by rule shall update this MOU not later than the fifth anniversary of its effective date, as required by Transportation Code, §201.607.

(e) The effective date of this MOU is September 1, 2013. Projects for which coordination with TPWD has been initiated prior to September 1, 2013 will complete coordination under the procedures of the pre-existing MOU. Projects for which coordination with TPWD has not been initiated prior to September 1, 2013 will be governed by this MOU.

§2.202. Applicability.

(a) Except as provided in subsection (b) of this section, this subchapter applies to:

(1) a state transportation project or Federal Highway Administration (FHWA) transportation project conducted by the Texas Department of Transportation (TxDOT);

(2) a state transportation project or FHWA transportation project of a private or public entity that is funded in whole or in part by TxDOT;

(3) a state transportation project or FHWA transportation project of a private or public entity that requires Texas Transportation Commission or TxDOT approval;

(4) a maintenance program for which a programmatic environmental review is conducted under §2.133 of this chapter (relating to Maintenance Projects and Programs); or

1 (5) any other type of project coordinated at TxDOT's
2 request.

3 (b) This subchapter does not apply to individual
4 maintenance projects for which a programmatic environmental
5 review is conducted under §2.133 of this chapter.

6 (c) For transportation projects for which TxDOT allows a
7 local government to be the project sponsor under §2.47 of this
8 chapter (relating to Approval of Local Government as Project
9 Sponsor), the local government project sponsor may use the
10 procedures specified in this MOU to coordinate directly with
11 TPWD, subject to TPWD approval on a case-by-case basis.

12
13 §2.203. Definitions. The following words and terms, when used
14 in this subchapter, or in documents prepared by the Texas
15 Department of Transportation (TxDOT) or Texas Parks and Wildlife
16 Department (TPWD) pursuant to this subchapter, have the
17 following meanings.

18 (1) Coordination--Actions between TxDOT and TPWD that
19 relate to and facilitate TPWD's review of and comments on the
20 potential environmental effects of a transportation project.
21 The goal of coordination is to minimize adverse impacts of
22 transportation projects on the fish and wildlife resources of
23 Texas while maximizing efficient use of each agency's resources.

24 (2) Best management practices (BMPs)--Actions taken to
25 minimize the adverse effects of transportation projects on fish
26 and wildlife resources.

1 (3) Ecological Mapping Systems of Texas (EMST)--An on-
2 going effort to map vegetation of Texas at high resolution using
3 multi-spectral aerial imagery and intensive on-ground
4 verification.

5 (4) Environmental report--A report, form, checklist,
6 or other documentation analyzing an environmental issue in the
7 context of a specific transportation project or presenting a
8 thorough summary of an environmental study conducted in support
9 of an environmental review document, or demonstrating compliance
10 with a specific environmental requirement. The term does not
11 include a permit or other approval outside the scope of the
12 environmental review process.

13 (5) Environmental review document--An environmental
14 assessment, an environmental impact statement, a reevaluation, a
15 supplemental environmental impact statement, or, for an FHWA
16 transportation project, a document prepared to demonstrate that
17 it qualifies as a categorical exclusion when FHWA requires a
18 narrative document as opposed to a checklist. An environmental
19 review document includes any attached environmental reports.

20 (6) Federal Highway Administration (FHWA)--The United
21 States Department of Transportation Federal Highway
22 Administration.

23 (7) FHWA transportation project--A transportation
24 project for which FHWA's approval is required by law to comply
25 with NEPA, FHWA is the lead federal agency, and FHWA agrees

1 TxDOT may act as the joint lead agency under 23 Code of Federal
2 Regulations §771.109.

3 (8) Important remnant vegetation--A type of vegetation
4 that is considered by TPWD to be rare, have local value, or to
5 have substantially declined in recent times. This includes
6 vegetation communities listed in the TCAP as of special
7 conservation concern, or as S3 or rarer, and communities listed
8 as suitable habitat and within the range of any Species of
9 Greatest Conservation Need (SGCN). For the purposes of this
10 MOU, in the event there is a range rank (e.g. S3S4) the lower
11 rank should be used in determining the rarity of the community.

12 (9) Mitigation--For the purpose of this MOU, the
13 actions taken to reduce the adverse impacts to the natural
14 environment that result directly from a transportation project.
15 The term includes actions taken to avoid, minimize, or to
16 compensate for impacts.

17 (10) NEPA--The National Environmental Policy Act,
18 codified at 42 United States Code §§4321, et seq.

19 (11) Plant community association--A plant community of
20 definite floristic composition (dominant/diagnostic species),
21 uniform habitat conditions, and uniform physiognomy.

22 (12) Qualified biologist--A qualified biologist must
23 have, at a minimum, a successful completion of a full 4-year
24 course of study in an accredited college or university leading
25 to a bachelor's or higher degree with a major in biological
26 sciences, natural resource management, wildlife science or

1 management, ecology, zoology, botany, conservation biology, or a
2 closely related field and have experience relevant to the
3 species, habitat, or ecosystems that are being studied or
4 described.

5 (13) Range--The general area where a species would be
6 expected to occur as listed by county on the TPWD website or
7 where available, as shown in range maps provided in or
8 referenced by the TCAP.

9 (14) Right of way--Property acquired for the purpose
10 of a transportation project.

11 (15) Riparian vegetation--River- or creek-dependent
12 habitats which rely on periodic flooding or flushing, sub-
13 irrigated substrates, and other influences of the ephemeral or
14 perennial rivers or creeks to which they are adjacent, including
15 floodplains, wet woodlands, gallery riverine forests, oxbows,
16 swamps, and vegetated islands.

17 (16) Species of Greatest Conservation Need (SGCN)--
18 Species of plants or animals that are identified in the TCAP.

19 (17) State threatened or endangered species--A species
20 of wildlife listed as threatened in 31 TAC §65.175 (relating to
21 Threatened Species) or as endangered in 31 TAC §65.176 (relating
22 to Endangered Species), or a plant species listed as threatened
23 or endangered in 31 TAC §69.8 (relating to Endangered and
24 Threatened Plants).

1 (18) State transportation project--A transportation
2 project that is not a major federal action for the purpose of
3 NEPA.

4 (19) Suitable habitats--Habitats that provide a
5 species or community with the specific physical location and
6 conditions needed to survive and persist. These may include
7 terrestrial and aquatic vegetation communities; a particular
8 watershed, waterbody or stream segment; water quantity or
9 quality thresholds; particular geologic substrates (such as
10 limestone, granite, and sands) or formations (such as karst and
11 caves); or a species host.

12 (20) Texas Conservation Action Plan (TCAP)--The
13 natural resources conservation plan for the State of Texas. The
14 TCAP identifies fish and wildlife resources of the state,
15 including SGCN and their habitats, outlines activities to
16 improve SGCN status and prevent federal threatened or endangered
17 species listings where possible, and articulates conservation
18 needs. The TCAP is stewarded by TPWD and implemented across the
19 state by TPWD and conservation partners. The TCAP provides
20 definitions for ecological systems, plant community
21 associations, and habitats which are important for SGCN.

22 (21) Tier I site assessment--A preliminary site
23 assessment to determine impacts and coordination requirements
24 with TPWD.

25 (22) Tier II site assessment--An environmental report
26 that demonstrates quantitative (acres) and qualitative (high,

1 medium, or low) determination of ecological systems and plant
2 community associations affected by a transportation project.
3 Tier II site assessments require an on-site verification by a
4 qualified biologist to the extent access to new right of way is
5 available.

6 (23) TPWD--Texas Parks and Wildlife Department.

7 (24) TxDOT--Texas Department of Transportation.

8 (25) Transportation enhancement--An activity that is
9 listed under 23 United States Code §101(a)(35), relates to a
10 transportation project, and is eligible for federal funding
11 under 23 United States Code §133.

12 (26) Transportation project--A project to construct,
13 maintain, or improve a highway, rest area, toll facility,
14 aviation facility, public transportation facility, rail
15 facility, ferry, or ferry landing. A transportation enhancement
16 is also a transportation project.

17 (27) Wetland--An area (including a swamp, marsh, bog,
18 prairie pothole, or similar area) having a predominance of
19 hydric soils that are inundated or saturated by surface or
20 groundwater at a frequency and duration sufficient to support,
21 and that under normal circumstances does support, the growth and
22 regeneration of hydrophytic vegetation.

23
24 §2.204. Texas Natural Diversity Database (TXNDD).

25 (a) TPWD maintains the TXNDD. The TXNDD contains
26 information on listed and proposed threatened and endangered

1 species, both state and federal, SGCN, important remnant native
2 vegetation, and other features of Texas natural history. TPWD
3 will continue to provide TXNDD information to TxDOT.

4 (b) This MOU authorizes certain limited use and
5 distribution of this information, and specifies security
6 requirements. The mechanisms established for transferring
7 electronic TXNDD information from TPWD to TxDOT will be used to
8 transfer electronic information relevant to this subchapter,
9 such as TCAP data and EMST data.

10 (c) The TXNDD is the property of TPWD.

11 (d) Except as provided in subsection (e) of this section,
12 TxDOT will not release the TXNDD or any portion of it to outside
13 parties unless TxDOT receives a request under the Texas Public
14 Information Act for the TXNDD or information contained therein,
15 in which case TxDOT will notify TPWD of the request.

16 (e) Texas Public Information Act requests for copies of
17 approved environmental review documents and environmental
18 reports that contain information from the TXNDD do not require
19 TPWD notification.

20 (f) TxDOT will conduct training on access and use of the
21 TXNDD as it relates to transportation projects. The training
22 will be developed jointly by TxDOT and TPWD.

23 (g) TxDOT will provide completed TXNDD reporting forms for
24 observations of tracked SGCN occurrences within TxDOT project
25 areas.

(h) TXNDD reporting requirements shall be incorporated into the site assessment protocol.

§2.205. Determining Need for TPWD Coordination.

(a) TxDOT will perform a Tier I site assessment for all projects subject to this subchapter.

(1) A Tier I site assessment is used to determine impacts and the need for coordination with TPWD. The Tier I site assessment will define the type and amount of habitat impacted using information from TCAP, EMST, TXNDD, county lists of Rare and Protected Species of Texas maintained by TPWD; county lists of endangered, threatened, and candidate species maintained by the U.S. Fish and Wildlife Service; and the most current aerial photography available. The results of a Tier 1 assessment will be recorded in the Texas ECOS project file.

(2) TxDOT will compare the results of a Tier I site assessment to the triggers in §2.206 of this subchapter (relating to Coordination Triggers) and thresholds found in the Threshold Table Programmatic Agreement developed under §2.213 of this subchapter (relating to Programmatic Agreements) to determine the need for coordination with TPWD.

(3) Tier I site assessments may require a field visit by a TxDOT qualified biologist to resolve the level of impact and, therefore, the requirement to coordinate a project with TPWD.

1 (b) TxDOT will coordinate with TPWD under §2.207 of this
2 subchapter (relating to Early Project Coordination) or §2.208 of
3 this subchapter (relating to Administred Project Coordination)
4 concerning a proposed transportation project if a trigger under
5 §2.206 is met or a threshold found in the Threshold Table
6 Programmatic Agreement developed under §2.213 is exceeded, and
7 one of the following conditions is also met:

8 (1) the project has not previously completed
9 coordination;

10 (2) the project has been previously reviewed by TPWD
11 but is the subject of a reevaluation or revision and the scope
12 of the reevaluation or revision relates to an issue on which
13 TPWD commented; or

14 (3) the project has been previously reviewed by TPWD
15 but is the subject of a reevaluation or revision and the change
16 proposed in the reevaluation or revision, considered as a stand-
17 alone transportation project, is a substantial change to the
18 project from the previous coordination.

19 (c) For the purposes of subsection (b) of this section, a
20 change is substantial if it is equal to or greater than at least
21 one of the factors listed in §2.206 of this subchapter, or the
22 proposed new impacts would be greater than had previously been
23 coordinated or now exceed a threshold found in the Threshold
24 Table Programmatic Agreement developed under §2.213 of this
25 subchapter. These changes can include, but are not limited to,
26 increased impacts to fish and wildlife resources or rare

1 vegetation series identified in the TCAP, changes in the status
2 of such resources since the previous coordination, or the
3 identification of a new TXNDD record or records of rare or
4 protected species or managed areas that may be impacted and that
5 are different than those identified when coordination was
6 previously conducted.

7 (d) No coordination under this MOU is required for a
8 project that is not described by subsection (b) of this section.

9
10 §2.206. Coordination Triggers. The triggers described in this
11 section shall be used to determine whether coordination is
12 required as provided by §2.205 of this subchapter (relating to
13 Determining Need for TPWD Coordination).

14 (1) The project is within the range of a state
15 threatened or endangered species or SGCN as identified by the
16 TPWD County list of Rare and Protected Species as it exists on
17 the day the agreed-upon project scope is finalized under §2.44
18 of this chapter (relating to Project Scope) or if there is no
19 project scope and for reevaluations, as it exists when TxDOT
20 makes its determination regarding whether coordination is
21 required, and there is suitable habitat, unless BMPs as defined
22 in this MOU are implemented as provided by a programmatic
23 agreement developed under §2.213 of this subchapter (relating to
24 Programmatic Agreements).

1 (2) The project may adversely impact important remnant
2 vegetation based on the judgment of a qualified biologist or as
3 mapped in the TXNDD.

4 (3) The project requires a nationwide permit with pre-
5 construction notification or an individual permit, issued by the
6 United States Army Corps of Engineers.

7 (4) The project includes in the TxDOT right of way or
8 conservation, construction, or drainage easement more than 200
9 linear feet of stream channel for each single and complete
10 crossing of one or more of the following that is not already
11 channelized or otherwise maintained:

12 (A) channel realignment; or

13 (B) stream bed or stream bank excavation,
14 scraping, clearing, or other permanent disturbance.

15 (5) The project contains known isolated wetlands
16 outside existing TxDOT right of way that will be directly
17 impacted by the project.

18 (6) The project may impact at least 0.10 acre of
19 riparian vegetation based on the judgment of a qualified
20 biologist or as mapped in the EMST.

21 (7) The project disturbs habitat in an area equal to
22 or greater than the area of disturbance indicated in the
23 Threshold Table Programmatic Agreement developed under §2.213 of
24 this subchapter.

25
26 §2.207. Early Project Coordination.

1 (a) It is the intention of TxDOT and TPWD that coordination
2 during early project development will be the primary mechanism
3 for coordination of projects between the agencies.

4 (b) To request early project coordination, TxDOT will
5 provide available and relevant project information to TPWD.
6 TxDOT and TPWD will work cooperatively to identify any
7 additional documentation appropriate for review and comment on
8 the project.

9 (c) TPWD will notify TxDOT when documentation is sufficient
10 to conduct early project coordination. Upon completion of the
11 review, TPWD will provide determinations and recommendations to
12 TxDOT. Upon TPWD submission of determinations and
13 recommendations and TxDOT written response in accordance with
14 Parks and Wildlife Code, §12.0011(c), early project coordination
15 is complete.

16 (d) TPWD determinations and recommendations must be issued
17 by the TPWD Wildlife Habitat Assessment Program, and TxDOT
18 written responses must be issued by TxDOT's Environmental
19 Affairs Division. All other communications during early project
20 coordination may be made by other appropriate organizational
21 units of the respective agencies or other entities approved by
22 the respective agencies. TxDOT's Environmental Affairs Division
23 and the TPWD Wildlife Habitat Assessment Program are each
24 responsible for identifying its respective agency's rules and
25 requirements.

1 (e) TxDOT may make project modifications and request
2 additional TPWD comment. TPWD may review final project
3 documents and final environmental review documents.

4 (f) Projects for which early project coordination is
5 completed do not require additional coordination unless project
6 modifications warrant re-coordination under §2.205(b)(2) or (3)
7 of this subchapter (relating to Determining Need for TPWD
8 Coordination).

9 (g) The TxDOT department delegate for the project will
10 ensure that the results of any coordination with TPWD, including
11 efforts made by TxDOT during project planning and design to
12 avoid and minimize impacts to natural resources, shall be
13 summarized in the project's environmental review document.

14
15 §2.208. Administrated Project Coordination.

16 (a) Administrated project coordination will be conducted
17 for projects subject to coordination under this MOU, but for
18 which early project coordination is not completed.

19 (b) Administrated project coordination will occur between
20 TxDOT's Environmental Affairs Division and the TPWD Wildlife
21 Habitat Assessment Program, unless those two units agree in
22 writing to allow other appropriate organizational units of the
23 respective agencies or other entities approved by the respective
24 agencies to conduct the coordination. TxDOT's Environmental
25 Affairs Division and the TPWD Wildlife Habitat Assessment

1 Program are each responsible for identifying its respective
2 agency's rules and requirements.

3 (c) To initiate administrated project coordination, TxDOT
4 will submit the coordination package to TPWD for review and
5 comment. The coordination package consists of a cover letter
6 that requests review pursuant to this MOU, the Tier II site
7 assessment, and any other environmental studies or reports that
8 TxDOT believes are relevant to TPWD's review of the project.
9 This coordination package is prepared and submitted to TPWD
10 prior to the environmental document being produced.

11 (d) Texas ECOS is a web-based relational database for
12 electronic communication and tracking of environmental
13 coordination. TPWD will be provided access with user privileges
14 to Texas ECOS with the intention of making information exchange
15 paperless and real time. Until TPWD has provided written
16 agreement that Texas ECOS is adequate for TPWD coordination
17 review, all administrated coordination will be conducted in
18 writing and transmitted on agency letterhead.

19 (e) TPWD will comment on any aspect of the project it
20 determines may have adverse impacts to fish and wildlife
21 resources.

22 (f) For written communications, TPWD will notify TxDOT by
23 email to indicate when it has received the coordination package
24 for its review. TPWD shall have 45 days from the date TPWD
25 receives the coordination package for its review, or from five
26 business days after the date of transmittal of the coordination

1 package, whichever occurs first, to provide its comments on the
2 project. Once Texas ECOS is accepted as the means for
3 communicating and tracking project coordination, the 45-day
4 clock will start on the first business day after notification to
5 TPWD that the coordination information is available in ECOS.

6 (g) TPWD may request additional information during the 45-
7 day review period, in which case TxDOT will provide the
8 requested information if the information is available or can be
9 reasonably obtained. If the requested information cannot be
10 provided, then TxDOT will inform TPWD and explain why in
11 writing.

12 (h) TxDOT will consider and implement when mutually
13 agreeable, the comments that are submitted by TPWD within the
14 45-day review period. TxDOT will provide TPWD with a written
15 explanation of TxDOT's decisions or other action within 90 days
16 of making a decision related to the comment.

17 (i) If TPWD submits comments after the end of the 45-day
18 review period, TxDOT will consider the comments in making
19 decisions on the project to the extent practicable, and provide
20 a written response in the same manner indicated in subsection
21 (e) of this section.

22 (j) The TxDOT department delegate for the project will
23 ensure that the results of any coordination with TPWD, including
24 efforts made by TxDOT during project planning and design to
25 avoid and minimize impacts to natural resources, shall be
26 summarized in the project's environmental review document.

§2.209. Tier II Site Assessment.

(a) Tier II site assessments are the basis for evaluating project impacts and are the primary environmental report used for administrated coordination under this subchapter. A programmatic agreement will be developed and approved to provide implementation requirements for site assessments.

(b) A Tier II site assessment will be prepared for those projects that are subject to coordination under this MOU and for which early project coordination is not completed.

(c) A Tier II site assessment must include a review of the TCAP and documentation of the direct impacts from the project to ecosystems, plant community associations, preferred habitat for SGCN that are within range, easements, and land set aside for environmental mitigation. Additionally, a TxDOT qualified biologist will provide field verification to confirm potential direct and indirect impacts, assess the quality of impacted fish and wildlife resources, and determine the areal extent of ecological systems and plant community associations for the entire project area, and whether any or all of the project may result in adverse impacts to fish and wildlife resources.

(d) At a minimum, Tier II site assessments will include:

(1) a description of the project, including the natural setting in which the project occurs, the existing conditions, and the proposed action;

(2) a description of the quantity and quality of any habitat that occurs for species on the county list within or abutting the right of way; and

(3) any proposed steps to be taken to mitigate potential adverse impacts on resources.

(e) Protocols for review of TXNDD information and an interpretation of the data will be included in the site assessment programmatic agreement.

(f) It is understood that a lack of access to the new right of way may limit the amount of information available for the habitat description. Existing data shall be used to provide a best estimate in these circumstances.

§2.210. Communication during Construction.

(a) TxDOT will communicate with TPWD when unforeseen impacts on species that are included on TPWD county lists or their habitat are identified during construction of a project.

(b) TPWD and TxDOT will conduct site visits at the request of either party and upon scheduling agreement of both parties.

§2.211. Project Tracking. TxDOT will maintain records of all projects subject to this subchapter. TPWD may request information electronically from TxDOT until Texas ECOS is operational at TPWD offices. The information request should specify time ranges and geographic areas for the records. TxDOT will respond within 30 days of the request.

1
2 §2.212. Site Access. TPWD may make site visits to any TxDOT
3 construction or maintenance site. TPWD must provide TxDOT
4 timely notification of its intention to conduct an on-site visit
5 to an ongoing construction site and must comply with all safety
6 requirements identified in TxDOT's response or as instructed by
7 the on-site responsible person.

8
9 §2.213. Programmatic Agreements.

10 (a) The Interagency MOU Implementation Team created under
11 §2.214 of this subchapter (relating to Interagency MOU
12 Implementation Team) will develop programmatic agreements to
13 address issues not specifically identified in this subchapter.
14 Programmatic agreements must be approved by the Executive
15 Director of each agency prior to their effective date.

16 (b) At a minimum, the Interagency MOU Implementation Team
17 will develop programmatic agreements described in this
18 subsection.

19 (1) A programmatic agreement detailing the information
20 required to be included in a Tier II site assessment will be
21 developed. This programmatic agreement will set forth the Tier
22 II site assessment requirements in greater detail than that
23 provided in §2.209 of this subchapter (relating to Tier II Site
24 Assessment).

25 (2) A threshold table programmatic agreement will be
26 developed to establish thresholds to be used in making the

determination required by §2.205 of this subchapter (relating to Determining Need for TPWD Coordination).

(3) A programmatic agreement concerning TxDOT-funded positions at TPWD will be developed. The goal of this programmatic agreement will be to reduce the number of projects referred to TPWD for coordination by 50 percent, reduce average project review times, and increase the environmental value of project mitigation.

(4) A programmatic agreement for updating and supporting the TXNDD to be a best in class resource will be developed.

(5) A programmatic agreement concerning conservation projects will be developed.

(6) A programmatic agreement concerning BMPs will be developed. The interagency team will develop new BMPs for adoption by TxDOT and TPWD to reduce the number of projects referred to TPWD as a result of meeting triggers for state threatened or listed species, and other triggers as appropriate, and to further mitigate the adverse impacts of transportation projects.

(c) Programmatic agreements may be changed at any time by the written concurrence of the Executive Directors of TxDOT and TPWD.

§2.214. Interagency MOU Implementation Team.

1 (a) The Executive Directors of TxDOT and TPWD or their
2 delegates shall mutually appoint an interagency team which will
3 be formed within two months of the effective date of this MOU
4 and will meet, at a minimum, quarterly for the first two years
5 of implementation of this MOU, and on a semi-annual basis
6 thereafter, unless a majority of the team deems it necessary to
7 meet more frequently.

8 (b) The interagency team will prepare recommendations for
9 the next update of this MOU.

10 (c) The interagency team will develop metrics for tracking
11 the effectiveness of this MOU and will provide an annual report
12 to the leadership of TxDOT and TPWD. This report will include,
13 at a minimum, the actual number of projects coordinated, the
14 reduction in the number of projects coordinated as a result of
15 changes to the environmental review process effectuated by this
16 MOU, an analysis of the time to complete project coordination,
17 the adverse impacts of transportation projects by habitat type,
18 the conservation of habitat resulting from mitigation,
19 evaluation of the value of any TxDOT-funded positions at TPWD,
20 and recommendations regarding continuation of those positions.

21 (d) The interagency team will evaluate and make
22 recommendations to improve the usefulness and applicability of
23 TPWD comments.

24 (e) The interagency team will facilitate reviews and
25 comments on agency guidance and protocols developed to implement
26 this MOU.

1 (f) The interagency team shall review the early project
2 coordination process periodically and make recommendations for
3 improving process efficiency and usefulness. The interagency
4 team will be responsible for attempting to resolve any conflict
5 between TPWD and TxDOT that results from the implementation of
6 this subchapter before elevating to agency management.

REPEAL